

BIRNBERG & ASSOCIATES  
CORY A. BIRNBERG (SBN 105468)  
1083 Mission St., Third Floor  
San Francisco, California 94103  
Telephone Number: (415) 398-1040  
Facsimile Number: (415) 398-2001

Attorneys for Plaintiff  
JAMES ANTHONY BILLER

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

|  |   |                              |
|--|---|------------------------------|
| JAMES ANTHONY BILLER, an                     | ) | Case No. C 10-05731 SC       |
| individual,                                  | ) |                              |
|  | ) | PLAINTIFF'S MOTION <i>IN</i> |
| Plaintiff,                                   | ) | <i>LIMINE</i> NO. 8          |
|  | ) |                              |
| vs.  | ) | MOTION <i>IN LIMINE</i> TO   |
|  | ) | EXCLUDE EXPERT'S             |
| TERILYN, its engines, tackle, equipment,     | ) | TESTIMONY AS TO              |
| furnishings, and machinery, <i>in rem</i> ,  | ) | PHOTOGRAPH;                  |
| WESTAR MARINE SERVICES, a business)          | ) | DECLARATION OF CORY          |
| entity of unknown form, <i>in personam</i> , | ) | BIRNBERG IN SUPPORT OF       |
|  | ) | MOTION <i>IN LIMINE</i>      |
| Defendants.                                  | ) |                              |
| _____  | ) |                              |

Plaintiff hereby moves this Court for an order excluding any testimony (either oral or written) proffered by defendant's expert, Captain Johnson, as to a photograph referred to in his report and his supposition there from.

INTRODUCTION

In his expert report Captain Johnson hypothesizes that, if plaintiff was pulling on a line that Captain Johnson believes is depicted in a photograph then plaintiff "contributed" to his injury. Declaration of Cory Birnberg in Support of Motion *in Limine* ("Birnberg Declaration") and exhibits attached thereto. Captain Johnson goes on to say what he believes the photo "seems to show". Captain Johnson has to make such speculative

Motion *in Limine* No. 8

Motion *in Limine* to Exclude Expert's Testimony as to Photograph; Declaration of Cory Birnberg in Support of Motion *in Limine*

1 observations because **he was not there** when the photograph was taken and he cites to no  
2 testimony identifying what was going on in that photograph. For all Captain Johnson  
3 knows, the photograph could be the result of one of those side conversations that occurs  
4 during an inspection that is unrelated to the case at hand or perhaps plaintiff was  
5 demonstrating what he did not do. The photograph speaks for itself, in that it merely shows  
6 plaintiff with his hands in a particular position. Attaching a speculative meaning constitutes  
7 inadmissible hearsay. Any inferences drawn from this photograph are pure speculation and  
8 guesswork; as such it is inappropriate for expert testimony.

#### 10 ARGUMENT

11 An expert is required to provide a sound basis for his opinion and his testimony  
12 must be based on reliable data. *Daubert v. Merrell Dow* (1993) 509 US 579, 593; FRCP  
13 Rule 26(a). Although an absolute certainty is not required, an expert's opinion must be  
14 based on facts "to express a reasonably accurate conclusion as opposed to conjecture or  
15 speculation. [citation omitted]". *Kieffer v. Weston Land, Inc.*, 90 F.3d 1496, 1499 (10<sup>th</sup> Cir.  
16 1996) [expert not permitted to testify as to an injury which a defect could have caused  
17 where the expert had no reasonable grounds for the belief that such a defect existed when  
18 the injury occurred]. The purpose of expert opinions and testimony is to assist the trier of  
19 fact. FRE Rule 702. Speculation and terms like "seems to show" is not assistance to the trier  
20 of fact. "A liability expert is only helpful to the fact finder if he is able to establish such an  
21 element of the claim through visual inspection, independent research, testing, and  
22 knowledge." *Clark v. Takata Corp.* 192 F.3d 750, 757 (7<sup>th</sup> Cir., 1999). An expert must take  
23 steps to verify the accuracy of the facts; the failure to do so can result in their testimony  
24 being excluded. Such unverified facts do not assist the tier of fact. *U.S. Salt, Inc. v. Broken*  
25 *Arrow, Inc.* 2007 U.S. Dist. LEXIS 43376, 5-6 (D. MN 2008).

1 Captain Johnson cannot establish his claims as to liability because he was not  
2 present when the photograph was taken and has no independent knowledge of what  
3 circumstance led to the photograph. He also did not indicate that he had done any steps to  
4 independently verify his “facts” (which, of course, would be difficult to do, as the “facts”  
5 consist of his imagination as to what is depicted in the photograph). Moreover, Captain  
6 Johnson is not qualified to offer an interpretation of the photograph. “Courts must act as  
7 gatekeepers to ensure that all expert testimony admitted at trial is both relevant and reliable.  
8 Dodge v. Cotter Corp., 328 F.3d 1212, 1221 (10th Cir. 2003). The proponent of an expert  
9 bears the burden of demonstrating that the requisite admissibility requirements are met by a  
10 preponderance of the evidence. Fed. R. Evid. 702 advisory committee's note.” *Ponca Tribe*  
11 *of Indians of Okla. v. Cont'l Carbon Co.*, 2009 U.S. Dist. LEXIS 117418 (W.D. Okla.  
12 2009).

13  
14  
15 Furthermore, by adopting his own interpretation of the photograph, Captain Johnson  
16 is attempting to present inadmissible hearsay before the jury. While FRE Rule 703 permits  
17 an expert to render opinions based on hearsay, he can only do so if that hearsay is of the  
18 type reasonably relied upon by experts. A personal theory of what a photograph is showing  
19 is not the type reasonably relied upon by experts. Furthermore, even if the hearsay was  
20 reliable it cannot be offered to prove the truth of the matter stated therein. *Heishman v.*  
21 *Ayers* 621 F.3d 1030, 1040-1043 (9<sup>th</sup> Cir., 2010); *Paddack v. Dave Christensen, Inc.* 745  
22 F.2d 1254, 1261-62 (9<sup>th</sup> Cir., 1984) [“Rule 703 merely permits such hearsay, or other  
23 inadmissible evidence, upon which an expert relies, to be admitted to explain the basis of  
24 the expert’s opinion. It does not allow the admission of the reports to establish the truth of  
25 what they assert.”].

26  
27 ///

1 Here, masquerading as Captain Johnson's expert opinion is an unfounded depiction  
2 of a photograph which is presented in a highly prejudicial manner. Where the probative  
3 value of evidence is substantially outweighed by unfair prejudice, the Court can exclude  
4 that evidence. FRE Rule 403. Where evidence has an "undue tendency to suggest decision  
5 on an improper basis, commonly, though not necessarily, an emotional one" it is unfairly  
6 prejudicial. Advisory Committee Notes to Federal Rule of Evidence 403.  
7

8 Captain Johnson's testimony concerning his purely speculative opinion as to how  
9 the accident might have happened based on his own interpretation of what was being  
10 demonstrated in a photograph where he was not present should be excluded.  
11

12 Dated: August 21, 2012

BIRNBERG & ASSOCIATES

13 By: /s/ Cory A. Birnberg  
14 Attorneys for Plaintiff

15 DECLARATION OF CORY BIRNBERG  
16 IN SUPPORT OF MOTION *IN LIMINE*

17 I, Cory Birnberg, declare as follows:

18 1. I am an attorney at law licensed to practice in the state of California and  
19 before this Court. I make this declaration pursuant to my own personal knowledge and as to  
20 those matters stated upon information and belief, believe them to be true.

21 2. Attached hereto, as Exhibit A, is a true and correct copy of selected pages  
22 from Captain Johnson's report referencing the photograph.

23 3. Attached hereto, as Exhibit B, is a copy of the photograph I believe Captain  
24 Johnson is referring to.

25 I declare pursuant to 28 U.S.C. §1746(b) that the foregoing is true and correct.

26 Executed this day of 21<sup>st</sup> of August 2012 at San Francisco, California,

27 /s/ Cory A. Birnberg

28 BIRNBERG &  
ASSOCIATES  
1083 Mission Street,  
Third Floor  
SAN FRANCISCO  
CA, 94103

TEL (415) 398-1040  
FAX (415) 398-2001